

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-17

In the Matter of

Amendment of Section 73.202(h), RM-8170
Table of Allotments,
FM Broadcast Stations,
(Rosendale, New York)

**MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)**

Adopted: March 14, 1996; Released: March 28, 1996

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration by the State University of New York ("SUNY"), directed to the *Report and Order* in this proceeding, 10 FCC Rcd 11471 (1995). Sacred Heart University, Inc. ("Sacred Heart") and Aritaur Communications, Inc. ("Aritaur") filed Oppositions to the Petition for Reconsideration. WMHT Educational Telecommunications ("WMHT") filed a "Statement in Support of Petition for Reconsideration." SUNY filed a Reply to the Oppositions to its Petition for Reconsideration. For the reasons discussed below, we deny the Petition for Reconsideration.¹

BACKGROUND

2. At the request of SUNY, licensee of noncommercial educational Station WENP, Channel #204A, Rosendale, New York, the *Notice of Proposed Rule Making*, 8 FCC Rcd 947 (1993), proposed the allotment of Channel 273A to Rosendale and modification of the Station WENP license to specify operation on Channel 273A. In the *Notice*, we stated that the Station WENP license could be modified to a channel of the same class without providing an opportunity for competing expressions of interest. However, we noted that should another party express an interest in providing Rosendale with an additional local service, Channel 225A would be available for allotment. In the *Notice* we also observed that SUNY had not requested that Channel 273A be reserved for noncommercial educational use. In this regard, we stated that Commission policy generally does not permit the reservation of a commercial channel for noncommercial use except where channels in the reserved portion of the FM band (Channels 201-220) are not available due to TV Channel 6 interference or preclusion by a foreign allotment. For these reasons, we requested that SUNY provide information regarding the availability of

channels in the noncommercial educational FM band and clarify whether it seeks to have Channel 273A allotted on a commercial or noncommercial educational basis.

3. In response to the *Notice*, SUNY filed comments reiterating its intention to apply for the channel, if allotted. SUNY also stated that it does not want Channel 273A reserved for noncommercial use even though it will continue to operate Station WENP as a noncommercial educational station.

4. The *Report and Order* did not modify the noncommercial educational license of Station WENP to operate on Channel 273A. Instead, we allotted Channel 273A to Rosendale and opened a filing window. In doing so, we recognized that we had inadvertently proposed to modify a noncommercial educational FM license to an allotment in the commercial FM band. We determined that this would be contrary to Commission precedent of not assigning noncommercial educational FM stations to the commercial band in the absence of TV Channel 6 interference or preclusion by a foreign allotment.

5. In support of its Petition for Reconsideration, SUNY sets forth three arguments. First, SUNY contends that our action denying its proposed modification was inconsistent with Section 1.420(g) of our Rules which permits such a modification when there is an equivalent channel to accommodate other expressions of interest. Second, our action runs counter to the Commission policy of encouraging broadcast licensees to upgrade their facilities. Third, SUNY contends that our action was inconsistent with an earlier action in *Sioux Falls, South Dakota*, 51 FR 4169, February 3, 1986, in which we modified the license of noncommercial educational FM Station KCFS, Channel #211A, Sioux Falls, South Dakota, to specify operation on Channel 261A without Channel 261A being reserved for a noncommercial educational service. We will consider these arguments *seriatim*.

DISCUSSION

6. Our action not modifying the license of noncommercial educational Station WENP to a channel in the commercial band was consistent with Section 1.420(g) of the Rules. In *Modification of FM and TV Licenses*, 56 RR 2d 1253 (1984), the Commission adopted the procedure which permits an FM station to modify its license through a rulemaking proceeding to a nonadjacent FM channel provided there is an equivalent channel to accommodate any expression of interest in the proposed FM channel. This procedure is now set forth in Section 1.420(g) of the Rules. In taking this action, the Commission specifically stated that a modification of a noncommercial educational FM station from the noncommercial educational band to a channel in the commercial FM band was "outside the scope" of that proceeding, 56 RR 2d at 1257. In view of that unequivocal statement by the Commission, there is no basis to suggest that our failure to implement the requested modification in this proceeding was somehow inconsistent with Section 1.420(g) of the Rules. Furthermore, in *Modification of FM and TV Licenses, supra*, the Commission did not alter the long-standing policy of assigning noncommercial educa-

¹ SUNY also filed an "Emergency Request for Stay of FM Application Window" and Aritaur filed an Opposition to that filing. In view of our action denying the underlying Petition for

Reconsideration, the Emergency Request for Stay of FM Application Window is now moot and will be dismissed.

tional FM stations into the commercial FM band only in situations of potential TV Channel 6 interference or preclusion by a foreign allotment. See *Comobabi, Arizona*, 47 FR 32717, July 29, 1982; *Burlington and Newport, Vermont*, 45 RR 2d 786 (1979); *Presque Isle, Maine*, 36 RR 2d 840 (1976); *Waco, Texas*, 10 FCC 2d 865 (1967); see also *Siloam Springs, Arkansas*, 2 FCC Rcd 7485 (1987). *aff'd* 4 FCC Rcd 4920 (1989); *Bulls Gap, Tennessee*, 10 FCC Rcd 10444 (1995).

7. As noted in the Petition for Reconsideration, Station WFPN currently operates on a shared-time basis with noncommercial educational FM Station WRHV, Channel *204A, Poughkeepsie, New York. We recognize that modification of the Station WFPN license to another channel would provide a public interest benefit by enabling both stations to provide a fulltime noncommercial educational service. However, in response to the *Notice*, SUNY stated that it did not want Channel 273A reserved for noncommercial educational use. As such, there is no assurance, beyond the present intention of SUNY, that Rosendale will continue to receive a local noncommercial educational service. We emphasize that the SUNY proposal would have removed the only allotment reserved for noncommercial educational use at Rosendale. On balance, we do not see an overriding public interest benefit in modifying the Station WFPN license to a commercial allotment.

8. The determination in this case is consistent with our 1986 action in *Sioux Falls, South Dakota, supra*. In *Sioux Falls, South Dakota*, we modified the license of noncommercial educational FM Station KCFS, Channel *211A, Sioux Falls, South Dakota, to specify operation on Channel 261A. In allotting Channel 261A to Sioux Falls, we did not reserve it for noncommercial educational use. That action is distinguishable from this case for three reasons. First, that action was undertaken to correct a Commission error in which the staff misinterpreted the desire of the licensee to retain Channel *211A. Instead, the staff reassigned the channel to another applicant. Second, there were four noncommercial educational FM stations licensed to Sioux Falls. In contrast to Rosendale, this was abundant local noncommercial educational service. Third, the *Notice* in that proceeding noted these facts and specifically requested comment on whether Channel 261A should be reserved for noncommercial educational use. In the present proceeding, the *Notice* did not provide adequate notice to the public that the Station WFPN license could be modified to a commercial allotment or request public comment on such a proposal. Under the circumstances of this case, we continue to believe that the public interest would not be served by removing the only noncommercial educational FM allotment from Rosendale.²

9. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by State University of New York IS DENIED.

10. IT IS FURTHER ORDERED, That the aforementioned Emergency Request for Stay of FM Application Window IS DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

² We note that SUNY is one of the applicants for the Channel 273A allotment at Rosendale, New York. In the event SUNY becomes the permittee of Channel 273A, it would have the

option of operating the station as a noncommercial educational facility.